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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LLOYD PHILIP LOCKE, Defendant and Appellant.	C048693 (Sup.Ct.No. 03F08925)

Defendant Lloyd Philip Locke entered a negotiated plea of no contest to six counts of committing forcible and nonforcible lewd acts on his daughter (Pen. Code, § 288, subds. (a), (b)), and one count of making a criminal threat (Pen. Code, § 422), as to which it was also alleged he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)).

He contends on appeal his statements during a police interrogation were unlawfully elicited in violation of *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*), and

were otherwise involuntary. We disagree and shall affirm the judgment.

BACKGROUND

Following a fight with her father (the defendant), the 17-year-old victim reported he had assaulted her with a knife and a stick, had pointed guns at her, and had fired at least one of them. She drew a map of the house, identifying where the weapons could be found, and consented to a search of the house for weapons. She also told officers defendant had been sexually molesting her since she was five.

Deputies contacted defendant around 3:30 p.m. He admitted threatening his daughter with a knife and admitted drinking whisky after fighting with her. He had a strong odor of alcohol, spoke quickly, and moved from side to side as he spoke.

Placed under arrest for assault with a deadly weapon, making criminal threats, and child abuse, defendant consented to a search of the house for weapons.

When Deputy Oania read defendant his *Miranda* rights and asked if he understood them, defendant responded, "No." Deputy Oania checked the "No" box on the written *Miranda* advisement form next to the question, "Do you understand each of these rights I have explained to you?" and wrote "Oania" on the form. Deputy Oania did not question defendant further.

Deputies searched the house, located the knife and stick where both defendant and his daughter had indicated they could be found, found three firearms, and discovered bullet holes inside the residence.

Meanwhile, defendant remained in custody and Detective Bielcik, aware of the allegations of sexual abuse, pressed defendant to provide consent to an unrestricted search of the house. At approximately 7:20 p.m., defendant consented to an unrestricted search of the house.

Deputies conducted a second, complete search of the house between approximately 8:00 and 10:00 p.m., during which they seized homemade videotapes depicting sex acts.

Simultaneously, Detective Bielcik began to interview defendant. Defendant reported he had snorted $20 worth of crank at about 2:00 a.m. that morning, drank about four ounces of whiskey shortly after noon, smoked marijuana at about 3:00 in the afternoon, but stated he no longer felt under the influence of any substance. At about 9:30 p.m., Detective Bielcik re-*Mirandized* defendant.[1] Bielcik "slowly" read the advisement form to defendant, who responded that he understood his rights. Defendant said, "I'll talk to you," signed the waiver form, and initialed statements that he understood his rights and, with those rights in mind, wished to speak to officers.

Defendant then told Detective Bielcik that he and the victim were consensual "sexual partners" and had engaged in sex

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[1] Detective Bielcik knew "patrol officers had [previously] read [defendant] his rights. They asked him if he understood, he said no, and patrol officer[s] stopped."

acts "uncountable times," beginning when she was six and a half years old and continuing until the day before his arrest.[2]

He was charged with 39 counts of sex offenses committed between 1991 and 2003 (including rape, lewd acts, and oral copulation), two counts of felony assault, and one count of making a criminal threat.

Defendant moved to suppress (1) the nonweapon evidence seized from his home and (2) his confession to Detective Bielcik, arguing that his statements and his second, unqualified consent to search were involuntary products of coercion by Detective Bielcik. He also asserted that he had invoked his right to remain silent when he received the first *Miranda* advisements from Deputy Oania, thereby rendering unlawful Detective Bielcik's reinitiating questioning.

After a hearing, the trial court granted defendant's motion to suppress evidence found in the second search of his house, on the ground defendant's unqualified consent to search his house was involuntary because defendant consented only after trying "no less than 28 times" to avoid doing so, thereby compelling the inference defendant "no longer felt free to decline the repeated requests[.]"

But the court denied defendant's motion to suppress his statements to Detective Bielcik. The court noted that when defendant was first read his *Miranda* rights by Deputy Oania in

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[2] The victim was pregnant at the time of defendant's arrest, and tests later established defendant was the father.

the afternoon, he showed evidence of intoxication and neither invoked his right to remain silent nor requested an attorney. After several hours had passed and "the effects of the alcohol and drugs [were allowed] to dissipate," Detective Bielcik did not act improperly in re-*Mirandizing* defendant, or in taking his statement after defendant responded "I'll talk to you" and signed the waiver.

Defendant eventually entered negotiated pleas of no contest to four counts of committing forcible lewd acts on the victim (Pen. Code, § 288, subd. (b)), two counts of nonforcible lewd acts (Pen. Code, § 288, subd. (a)), and one count of making a criminal threat (Pen. Code, § 422), as to which it was also alleged he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)), in exchange for dismissal of the remaining counts and a stipulated prison sentence of 49 years.[3]

DISCUSSION

Defendant contends his statements to Detective Bielcik should have been excluded because he invoked his right to silence during the earlier exchange with Deputy Oania, and Bielcik violated *Miranda* by reinitiating questioning. He also

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[3] The court later granted defendant's request to withdraw his plea and to enter a "slow plea on stipulated facts" to the same charges and with the stipulated same sentence, so as to preserve defendant's right to challenge the court's denial of his motion to suppress his statement to Detective Bielcik.

contends his statements were involuntary. We disagree with both contentions.

I

"Under the familiar requirements of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." (*People v. Sims* (1993) 5 Cal.4th 405, 440, limited on other grounds in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1037.) "Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" (*People v. Sims, supra,* 5 Cal.4th at p. 440, citing *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [68 L.Ed.2d 378, 385-386].)

Defendant contends, by telling Deputy Oania he did not understand his *Miranda* rights, he made "a metaphoric, but clear, assertion of his right to remain silent." Because Detective Bielcik disregarded that prior invocation of the right to remain silent, his subsequent statements to Detective Bielcik are inadmissible and his conviction must be reversed. (*Edwards v. Arizona, supra,* 451 U.S. 477, 485-487 [68 L.Ed.2d 378, 386-388]; *Miranda, supra*, 384 U.S. at pp. 473-474 [16 L.Ed.2d at p. 723].)

In evaluating a claim of whether a defendant invoked his right to remain silent under *Miranda*, we accept the trial court's factual findings and evaluations of credibility if

supported by substantial evidence. (*People v. Box* (2000) 23 Cal.4th 1153, 1194.) While we must undertake an independent review of the record to determine whether the right to remain silent was invoked (*People v. Jennings* (1988) 46 Cal.3d 963, 979), we also "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." (*Ibid*. *People v. Wash* (1993) 6 Cal.4th 215, 235-236.) Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197], *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.)

Although a suspect's assertion of the privilege against self-incrimination need not be "unequivocal" (*People v. Thompson* (1990) 50 Cal.3d 134, 165) or "invoked with unmistakable clarity" (*People v. Randall* (1970) 1 Cal.3d 948, 955, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17), it must be something more than "metaphorical," as defendant suggests. The court found defendant "never indicated a desire to remain silent" and "did not invoke his right to remain silent." Viewed in context, we agree with the court that defendant's "no" response when asked if he understood the recitation of his *Miranda* rights did not constitute an invocation of his right to silence. (Cf. *People v. Musselwhite, supra,* 17 Cal.4th at p. 1238.) In fact, defendant's response to Deputy Oania cannot be characterized even as an equivocal assertion of that right.

Far from suggesting a subtle use of metaphors, evidence supports the court's finding defendant may have failed to understand the *Miranda* advisements because he was intoxicated. The court credited Deputy Oania's observations that -- when first advised of his *Miranda* rights -- defendant smelled of alcohol, spoke quickly, and moved from side to side, and found defendant was then "under the influence . . . [and] highly agitated." Defendant himself admitted he had been drinking a few hours before.

Defendant insists we must construe his response as an invocation because "the patrol officers who had contact with [defendant] treated it as an invocation" and Detective Bielcik likewise "operated under the assumption that there had been an invocation" by defendant upon his first advisement in the afternoon. Our review of the record is to the contrary: nothing in the record indicates any officer believed defendant ever invoked his right to remain silent.

Instead, like the trial court, we infer from the fact that defendant was not interrogated after Deputy Oania attempted to advise him of his rights that Oania believed defendant could not evaluate *whether* to waive his right to remain silent, not that he *had* invoked it. Officers properly refrained from addressing the matter further with defendant until defendant "had a chance to calm down. . . . [and] sober up[,]" and could understand the recitation of *Miranda* advisements. "It is only through an awareness of these consequences [that anything said can and will be used against the individual in court] that there can be any

assurance of real understanding and intelligent exercise of the privilege." (*Miranda, supra*, 384 U.S. at p. 469 [16 L.Ed.2d at p. 721].) Indeed, had Deputy Oania proceeded with further attempts to *Mirandize* defendant and/or take his statement, he might have exposed deputies to a claim they attempted to exploit defendant's intoxicated state. (Cf. *People v. Markham* (1989) 49 Cal.3d 63, 67; *People v. Fowler* (1980) 109 Cal.App.3d 557, 563.)

There was no *Miranda* violation.

II

"Under both state and federal law, courts apply a 'totality of the circumstances' test to determine the voluntariness of a confession." (*People v. Massie* (1998) 19 Cal.4th 550, 576.) When addressing such claims, the ultimate question is "'whether defendant's choice to confess was not "essentially free" because his will was overborne.'" (*Ibid*.; see also *People v. Williams* (1997) 16 Cal.4th 635, 660.) The People have the burden of demonstrating voluntariness by a preponderance of the evidence. (*Massie, supra*, at p. 576; *People v. Whitson* (1998) 17 Cal.4th 229, 248.)

Although this issue is independently reviewed on appeal, appellate courts "'"give great weight to the considered conclusions"'" of lower courts. (*People v. Whitson, supra,* at p. 248; see also *People v. Wash* (1993) 6 Cal.4th 215, 235-236.) Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation];

physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams, supra*, 16 Cal.4th at p. 660.) The giving of *Miranda* warnings is relevant evidence on the issue of whether the questioning was in fact coercive. (*Beckwith v. United States* (1976) 425 U.S. 341, 348 [48 L.Ed.2d 1, 8].)

Here, the court declined to find defendant's admissions to Detective Bielcik were involuntary: "[T]here is no showing of gamesmanship as it relates to *Miranda*. [¶] Defendant was cooperative with officers at all times."

True, the court did find defendant's unqualified consent to search was involuntary because "[a] review of the transcripts reveals no less than 28 times [defendant] evaded, refused, or questioned Detective Bielcik's request for full consent."[4]

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[4] "In response to his repeated question, 'Will you give consent,' Mr. Locke said, 'For what?' 'I'd like to be there.' 'I just don't want you going over there at all.' 'I don't want to authorize a search without me being there.' 'It seems excessive to search my house.' 'If I don't have to, I would rather not.' 'I'd rather not.' 'They've already been in the house.' 'If I can be there when you do it.' 'What are you looking for?' 'You want me to consent without being there?' 'When do you want to search?'

"He said, 'Before they decide to take a look, I would like to figure out when I'm going to get out.' 'I want to go back and check.' 'I don't want to make that decision until I know when I'm getting out.' 'How long would it take for a search warrant?' 'You're not going to release me until you see the house.' 'Why not search before?' 'Did someone make a mistake?' 'Did they have me sign the wrong paper?' 'Why are we doing this again?' He asked 'why' again.

"He asked, 'Was the prior consent legally obtained?' He suggested the first one must not have been lawful. 'Did they mess up the first time?' 'I don't understand why I have to sign again.' 'Seems like they made a mistake.' 'It seems it was not legal.'

On appeal, defendant contends his consent to talk must likewise be deemed involuntary: he insists his will to refuse to speak to Detective Bielcik "was broken down by a litany similar to that used to obtain the consent to search, relying on a deflection of [his] resistance."

Our review of the interview transcript belies this characterization. After obtaining defendant's unhesitating response to some background questions (including his name, address, age, work, education, health, arrest and substance abuse history), and ensuring that defendant was oriented, Detective Bielcik continued: "What I wanted to do was kind of give you a chance to tell your side of the story if you want, you are not obligated to, but since . . . .

"[Defendant]: Can I talk to [the victim]?

"Detective: They are still looking at her right now.

"[Defendant]: Looking at her?

"Detective: Examining her. They have to wait for a doctor. They are backed up. So it's up to you if you want to talk to me. You are not obligated to. But since you are under arrest, I have to advise you of your rights.

"[Defendant]: I'd rather talk to her. You can be with me. In front of us or whatever.

"Detective: Well to be honest with you, that's not going to happen, because it's going to be forever until she is around.

"At this point the defendant did sign, but the Court finds he no longer felt free to decline the repeated requests; and, therefore, the Court is ruling that consent was not voluntary."

"[Defendant]: What? Say that again?

"Detective: It's going to be a long, long, long, long time until they are done with her at the hospital.

"[Defendant]: Really. How long is that?

"Detective: I don't know. Rest assured that it will be a long time. It will be sometime tonight, you know?

"[Defendant]: What time is it, about eleven?

"Detective: Coming up on 9:30. So basically what I want to do . . . We'll go over it again like we did before with the other. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have an attorney present before and during questioning and if you cannot afford an attorney, one will be appointed free of charge to represent you before and during questioning. Do you understand each of these rights I have explained to you?

"[Defendant]: Yes.

"Detective: With that in mind, do you want to talk to me now?

"[Defendant]: I'll talk to you." Almost immediately after this exchange, defendant admitted having sex with the victim "uncountable times."

We concur with the trial court's assessment that defendant "clearly want[ed] to talk to the officer" and had "become interested in letting the officer hear his side of the story." He called the officer by first name, willingly gave extensive background information, and at no point appeared unwilling to

speak to the detective, even after receiving his *Miranda* advisements. We do not construe his interest in speaking to the victim as an attempt to avoid or defer an interrogation, as he invited the detective to be present.

Defendant's statements to Detective Bielcik were voluntary.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

RAYE, Acting P.J.

BUTZ, J.